(21,583.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 408.

ROBERT H. TODD, APPELLANT,

vs.

HIGINIO ROMEU.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1909.

1 In the District Court of the United States for Porto-Rico.

At a Stated Term of the District Court of the United States for Porto-Rico, within and for the District aforesaid, begun and held at the Court Rooms of said Court in the City of San Juan, Porto-Rico, on the Second Monday of October, being the twelfth day of that month, in the Year of Our Lord One Thousand Nine Hundred and Eight, and of the Independence of the United States of America the One Hundred and Thirty-third.

Present: The Honorable Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a final decree in the following case, to wit:

In Equity. #206, Mayaguez Division.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Be it remembered, that heretofore, to wit, on the twenty-second day of April, A. D., 1904, came the Complainant by his Solicitor and filed his Bill of Complaint in this cause, which said Bill is in the words and figures following, to wit:

Bill for Injunction and to Quiet Title.

In Equity.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Higinio Romeu, a citizen of Porto-Rico, resident of Mayaguez, P. R., brings this his bill against Robert H. Todd, a citizen of the United States, residing in San Juan, P. R.

I. And your orator complains and says: That Robert H. Todd obtained a judgment in the U. S. Provisional Court on April
2 2nd, 1900, for the sum of $2946.05 against Pedro and Juan Agostini, and that the same was duly executed and returned "Nulla Bona." And that the said Robert H. Todd, upon the 9th day of December 1901 filed a creditors' bill upon the Equity side of this Court against Pedro Agostini, Juan Agostini and Ana Merle to subject certain property held in the name of Ana Merle for the use and benefit of Pedro Agostini; all of which will more fully appear by copies of said suit, which are on file in this Court and reference to which, is hereby prayed for all necessary purposes, without the necessity of attaching same to this bill, as Exhibits.

II. Your orator further represents, that among the several properties so held by Ana Merle, there was one consisting of a rural tract

of land comprising 21 cuerdas, equivalent to 8 hectares, 25 areas, and 39 centiareas, located in the ward of "Ceballos," Municipal District of Mayaguez, having a wooden dwelling house; bounded in the North, South, East, and West, by lands formerly belonging to Mrs. Isabel Valentina Merle.

III. Your orator further represents that upon the 18th day of December, 1903, your Honor decreed that the aforesaid parcel of lands, specifically described, was purchased by Ana Merle with funds belonging to Pedro Agostini and that said Pedro Agostini was the owner of the equitable and beneficial title of same.

IV. Your orator further represents unto your Honor that by the aforesaid decree of the 18th of December, 1903, your Honor ordered that the aforesaid 21 cuerdas, with all the improvements thereon, be sold at public auction on the 30th day of April, 1904, and by the same decree appointed William Falbe, Special Master to make said sale.

V. Your orator, Higinio Romeu, further represents unto your Honor, that on the 21st day of May A. D. 1903, your orator purchased from Ana Merle the aforesaid 21 cuerdas of land, after duly employing counsel to examine the title of same, for the sum
3 of One Thousand Two Hundred Dollars, and that before the said purchase said Counsel reported to your orator that Ana Merle had a good and sufficient title to said land, without any liens of any kind whatsoever. A copy of said deed is herewith attached marked Exhibit "A," and made a part of this your orator's Bill of complaint.

VI. Your orator further represents unto your Honor, that he had no notice, actual or constructive of the aforesaid suit of Robert H. Todd vs. Juan Agostini, Pedro Agostini and Ana Merle, and that your orator purchased the said property for the sum of $1200 in cash, and that said money was paid at the time of the making of the deed of conveyance; and your orator further states that he is a bona fide purchaser for the value of $1200.00, of the said property.

VII. Your orator further represents unto your Honor, that at the time of purchasing said property, the same was an abandoned estate, that the house was rapidly falling to decay and that the lands were covered with a growth of brambles and brush; and that your orator immediately after purchasing the same, tore down the house upon the premises and built a new one at a cost, to your orator of more than $2000; and your orator further represents, that he cleared the land and planted same in coffee, oranges and other fruit trees, at a cost, largely exceeding $1000.

VIII. Your orator further represents unto your Honor, that at the time of purchasing said property, he employed Counsel, and that a careful examination was made of the records of said property, in the office of the Registrar of Deeds of Mayaguez, and that those records showed that there were no liens, charges or cautionary notices or mentions of any class whatsoever recorded against said property, and that the said Pedro Agostini, Ana Merle and Juan Agostini informed your orator that the title to the said property was absolutely perfect.

IX. Your orator further represents unto your Honor that
4 the claims of said Robert H. Todd are without any right whatever, for the reason that same were not noted in the Registry of Property, as prescribed by law; and that the said Robert H. Todd is without any estate, right, title, interest or lien whatsoever, on the lands, or any portion thereof, heretofore described by your orator, as your orator is now the sole owner of the aforesaid piece of property.

X. Your orator further represents unto your Honor, that the said proposed sale, as aforesaid mentioned, is a cloud upon your orator's title to the said premises and has the effect to greatly depreciate the value thereof and to prevent your orator from making a sale of same.

In consideration thereof and for as much as your orator has no sufficient remedy at law for the wrong done and threatened to be done, and that the remedy at law, if any, would afford no protection to your orator, for the wrong threatened to be done, for the reasons hereinbefore stated, and is only relievable in a Court of Equity where matters of this kind are properly cognizable and reviewable.

Your orator prays the Court to grant to him your Writ of Subpœna directed to the said Roberto H. Todd, requiring and commanding him, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true direct and perfect answer make to all and singular the premises, and to stand, perform and abide such order, direction and decree as may be made against him in the premises, as shall seem meet and agreeable to equity.

That your Honor grant unto your orator a Writ of Injunction, commanding the said defendant, his agents, attorneys, servants and employees and all other persons acting under his authority, direction or control, to absolutely desist and refrain from selling the aforesaid property or allowing the sale of same at public auction,
5 and that your Honor declare that said Roberto H. Todd or any person claiming by or through him, are without lien or interest in the aforesaid 21 cuerdas with the appurtenances thereunto belonging.

That said defendant be restrained from the commission of any of the acts hereby sought to be enjoined, and that upon such hearing, the writ herein prayed for, pending this suit, be made and confirmed until the final determination of this action, and that thereupon said Injunction be made perpetual.

That upon the final hearing of this suit, your orator be confirmed in his title to the aforesaid twenty-one cuerdas with the appurtenances thereunto belonging.

And that your orator may have such other and further relief, preliminary and final, as to the Court may seem meet and proper, and which Equity may require, and for costs.

HORTON & CORNWELL,
Solicitors for Complainant.

Higinio Romeu, makes oath according to law, deposes and says: that the matters and things alleged in this Bill are true in points of fact.

HIGINIO ROMEU.

Subscribed and sworn to before me this 19th day of April, 1904.
[Stamp of the Notary, Mayaguez, P. R.]
MARIANO RIERA PALMER,
Notary Public.

Answer of Defendant.

Filed January 3rd, 1908.

No. 253. Equity.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

The Answer of the Defendant, Robert H. Todd, to the Bill of Complaint of Higinio Romeu, the Complainant.

6 This defendant, now and at all times saving and reserving to himself all benefit and advantage of exception which may be had or taken to the many errors, uncertainties and imperfections in complainant's bill of complaint contained, for answer to so much thereof as he is advised it is necessary to answer unto, answering says;

First, that he admits the allegations contained in the first four paragraphs of complainant's said bill.

Second, that upon information and belief he admits the allegations of the fifth paragraph of said bill; but further, upon information and belief, alleges that at the time of such purchase by complainant of the property referred to on the 21st day of May, A. D. 1903, both said complainant and the counsel with whom he had advised, as in said bill of complaint alleged, had both actual notice and knowledge of the pendency of the said suit of this defendant against the said Ana Merle and Pedro and Juan Agostini described in the first four paragraphs of said bill; and that the report of said counsel was made to said complainant with knowledge of the pendency of said suit but was so given based upon the legal opinion of said counsel that, so long as no notice of the pendency of said suit appeared annotated in the proper Registry of Property, other notice or knowledge of its existence did not affect the validity or completeness of the title which the record owner might convey and a purchaser from such owner might acquire.

Third, defendant, upon information and belief, denies the allegations of the sixth paragraph of complainant's bill to the effect that complainant at the time of his purchase had no knowledge or notice of the suit referred to in said bill, and alleges that complainant did have at that time both actual notice and knowledge thereof.

Fourth, defendant says that, as to the allegations of the seventh and eighth paragraphs of complainant's bill, he has neither
7 knowledge nor information sufficient to admit or deny the same, and hereby calls upon complainant for strict proof thereof.

Fifth, defendant denies, upon information and belief, the allegations of the ninth paragraph of complainant's bill and on the contrary alleges that the notice and information possessed by the counsel, with whom he advised, became thereby in law his knowledge, whether actually communicated or not; and that by virtue thereof the title acquired by complainant by his said purchase from said Ana Merle was and is subject to the lien acquired by this defendant under the terms of the final decree in said suit described in complainant's said bill of complaint.

And this defendant hereby denies any and all manner of unlawful combination or confederacy with which he is by the said bill charged, without this, that there is any other matter, cause or thing material for this defendant to answer unto, and not herein well and sufficiently answered, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant.

All which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

N. B. K. PETTINGILL,
Solicitor for Defendant.

UNITED STATES OF AMERICA,
District of Porto-Rico:

Robert H. Todd, being first duly sworn, says that he is the defendant in the above entitled suit, that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein alleged and set forth are true of his own knowledge, except as the same are therein stated to be upon his information and belief, and as to those things he believes them to be true.

R. H. TODD.

Sworn to and subscribed before me this 3rd day of January, 1908.
JOHN L. GAY, *Clerk.*

8 *Exceptions to Answer of Defendant.*

Filed February 12th, 1908.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Exceptions Taken by the said Complainant to the Answer of Defendant.

1st. For that the matter contained in paragraph second of defendant's answer is impertinent for the reason that the matters and things alleged in said paragraph do not under the laws of Porto-Rico constitute any defence to the complaint of plaintiff or to any part thereof.

2nd. For that the second paragraph of said answer is impertinent and is insufficient in that the matters and things therein alleged do not under the laws of Porto-Rico constitute any defense to the complaint or to any part thereof.

3rd. For that the matters and things contained in that part of paragraph fifth of said answer commencing with the words "and on the contrary alleges" and running to the end of said paragraph are impertinent for the reason the said allegations of said paragraph of said answer constitute no defence to the said complaint or to any part thereof.

Wherefore complainant prays that the said impertinent matter may be stricken from said answer, and for such other relief in the premises as to the Court may seem proper.

HORTON & CORNWELL,
Attorneys for Complainant.

Opinion of the Court.

Filed February 13th, 1909.

Equity. No. 206, Mayaguez.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

9 This cause was originally filed on April 22nd, 1904. It is a bill to enjoin the respondent from selling 21 cuerdas of land located in the barrio of Ceballos, in the municipal district of Mayaguez. The complainant claimed in his bill that he had caused the title of the tract of land in question to be examined and that according to the inscribed title, one Ana Merle, was the owner thereof and that he bought the same from her without any knowledge of any rights of the respondent therein, and that he paid $1200, in cash therefor at the time.

Previous to the filing of this bill, the respondent Robert H. Todd, had filed a bill in this Court on a judgment previously obtained in the Provisional Court of the Island. By that Bill he sought to subject this tract of land to the satisfaction of his said judgment. The judgment he so possessed was against one Pedro Agostini and one Juan Agostini, and he had secured a decree holding that these Agostinis or one of them, was the beneficial owner of the land in question, and under the decree thus obtained was about to sell the land.

When this present Bill was filed, the respondent Todd, demurred to it, and the demurrer was sustained on the ground that the filing of a suit in equity in this Court notwithstanding the local mortgage law, was a complete notice of *lis pendens* to all the world.

The Complainant Romeu, stood upon his demurrer, and took the case on appeal to the Supreme Court of the United States where the case was reversed under date of May 27, 1907. See Romeu vs. Todd, 206 U. S. 358.

When the Mandate of the Supreme Court came down, the cause was proceeded with, and on January 3rd, 1908, the respondent answered. Thereafter, on February 12, 1908, the complainant excepted to the answer. First: for the reason that the matter contained in paragraph second of the answer is impertinent in that the things alleged therein do not under the laws of Porto-Rico con-
10 stitute any defense to the complaint or any part thereof.

Second: because the second paragraph of the said answer is impertinent and insufficient and does not in like manner under the laws of Porto-Rico constitute any defense to the complaint or any part thereof, and third: because the matters contained in the fifth paragraph of the answer commencing with the words "and on the contrary alleges" and running to the end of said paragraph, are impertinent as the same do not constitute any defense.

The paragraphs referred to in substance set out that both the plaintiff and his counsel who examined the records for him before purchasing the land in question, had actual notice and knowledge of the pendency of the suit of Todd against Ana Merle and the Agostinis, and that nothwithstanding this, the plaintiff and his said counsel relying upon the fact that no cautionary or lis pendens notice was actually inscribed in the Registry, the plaintiff proceeded and bought the land.

We have examined the opinion of the Supreme Court of the United States above referred to with great care, and whilst there may be cases in which the knowledge of Counsel examining the records or of the purchaser of lands of the pendency of a suit regarding the land might be binding upon the purchaser, still we do not think that this is a case where that rule would apply.

In our opinion, it is unnecessary to hold, although we are inclined to believe that such is the law, that in Porto-Rico, under the mortgage law, an intending purchaser is not bound by any equities or rights of others regarding real property save where a cautionary notice is actually inscribed in the Registry of Property.

For this reason, we hold that the exceptions to the answer must be sustained and as in our opinion from our knowledge of the case it would be useless thereafter to proceed with the same, a decree will be prepared relieving the said property from all lien of the Todd judgment, and making the Injunction perpetual if necessary, and decreeing all of the costs including those made necessary by
11 the mandate of the Supreme Court, against the respondent Todd, and it is so ordered.

B. S. RODEY, *Judge.*

Entry Journal, San Juan.

February 23rd, 1909.

Equity. No. 206, Mayaguez.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Final Decree.

This cause having been heretofore argued and submitted to the Court upon the Exceptions filed by the complainant to the answer of the defendant, and the Court having in an opinion and decision r-cently filed herein sustained said exceptions and held that, in view of the admissions of the answer and the Court's knowledge of the issues involved, defendant had in fact no sufficient defence to said bill of complaint, and that a final decree ought now to go in favor of the complainant; it is hereupon, in conformity with said opinion and decision,

Ordered, adjudged and decreed that the equities of this cause are with the complainant; that said complainant is entitled to relief in accordance with the prayer of his bill; and that the defendant, Robert H. Todd, his agents and attorneys, and all other persons acting under his authority, be, and they hereby are, perpetually enjoined from selling, or causing to be sold, by virtue of the judgment obtained by him against Pedro and Juan Agostini in the U. S. Provisional Court of Porto-Rico on the 2nd day of April A. D. 1900, any property bought by complainant from one Ana Merle and more particularly a rural tract containing 21 cuerdas, located in the ward of "Ceballos," municipal district of Mayaguez having a wooden dwelling house and bounded on the North, south, east and
12 west by lands formerly belonging to Mrs. Isabel Valentina Merle; and that said defendant has no lien on said described tract by virtue of the judgment aforesaid.

It is further ordered, adjudged and decreed that com-lainant do have and recover from the defendant his costs in this behalf laid out and expended, including his costs recovered in the Supreme Court of the United States.

Done and ordered in open Court at San Juan, this 23rd day of February, A. D., 1909.

B. S. RODEY, *Judge.*

Petition of Appeal.

Filed February 23rd, 1909.

Equity. No. 253, San Juan; No. 206, Mayaguez.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

The defendant in the above entitled cause, Robert H. Todd, conceiving himself aggrieved by the order and decree made and entered by this Court in the above entitled cause under date of the 23d day of February, 1909, wherein and whereby it was, amongst other things, ordered and directed that a perpetual injunction issue against said defendant and that he be declared to have no lien upon the property of complainant described in his said bill, does hereby appeal from said final order and decree to the Supreme Court of the United States for the reasons to be set forth in an assignment of errors filed herewith; and he prays that this his petition for said appeal may be allowed, an appeal bond fixed, and that a transcript of the record, proceedings and pleadings upon which said final decree was based, duly authenticated, may be sent to said Supreme Court of the United States.

Dated at San Juan this 23rd day of February, 1909.

N. B. K. PETTINGILL,
Solicitor for Defendant, Appellant.

13 *Assignment of Errors.*

Filed February 23, 1909.

Equity. No. 253, San Juan; No. 206, Mayaguez.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Comes now the defendant, now appellant, by his Solicitor N. B. K. Pettingill, and assigns the following as the errors committed by the Court below during the progress of said cause, since the Mandate of the Supreme Court of the United States herein pursuant to which the original decree in this cause was reversed and the same remanded to this Court for further proceedings.

I.

The Court erred in sustaining the Exceptions filed by complainant to the answer of the defendant.

II.

The Court erred in holding that complainant was entitled to a decree upon the bill and answer after said exceptions were sustained.

III.

The Court erred in entering a final decree in favor of the complaint.

Wherefore this defendant and appellant prays the Honorable, the Supreme Court of the United States, to examine and correct the errors assigned, and for the reversal of said final decree of said District Court of the United States for Porto-Rico entered on the 23d day of February, 1909, as aforesaid.

N. B. K. PETTINGILL,
Solicitor for Defendant-, Appellant.

Appeal Bond.

Filed February 23rd, 1909.

Appeal Bond.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Know all men by these presents, that we, Robert H. Todd,
14 as principal, and Arthur J. Harvey, and Aden A. English, as sureties, are held and firmly bound unto Higinio Romeu, his heirs, executors, administrators and assigns, in the penal sum of Two Hundred and Fifty Dollars, for the payment whereof, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 23rd day of February, A. D., 1909.

Whereas lately at a session of said District Court of the United States for Porto-Rico, in a suit pending between said Higinio Romeu as complainant and the above bounden Robert H. Todd as defendant a final decree was signed and entered in favor of said complainant and against said defendant; and whereas said defendant has taken and been allowed an appeal from said final decree to the Supreme Court of the United States;

Now, the condition of the above obligation is such that, if the said Robert H. Todd, shall prosecute his said appeal to effect, and shall pay or cause to be paid all costs that may be awarded against him on said appeal, if he fail to make his plea good, then the above obligation shall be void, else to remain in full force and virtue.

ROBERT H. TODD. [SEAL.]
ARTHUR J. HARVEY. [SEAL.]
ADEN A. ENGLISH. [SEAL.]

Taken and approved by me this 23rd day of February, 1909.
B. S. RODEY, *Judge.*

Entry San Juan Journal February 23rd, 1909.

Order Granting Appeal and Fixing Bond.

253, San Juan; 206, Mayaguez.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

On motion of N. N. K. Pettingill, Esq., Solicitor for the
15 defendant, it is ordered that his petition of appeal this day filed be granted, that an appeal to the Supreme Court of the United States from the final decree entered herein on the 23rd day of February, 1909, be, and the same hereby is, allowed, that the bond on said appeal be fixed at the sum of Two Hundred and Fifty Dollars, and that a certified transcript of the record, pleading and proceedings herein be forthwith transmitted to said Supreme Court of the United States.

Whereupon said Solicitor presents to the Court an appeal bond in the penal sum above fixed, which is duly approved by the Court.

Præcipe for Transcript of Record.

Filed February 23rd, 1909.
Equity. No. 206, Mayaguez.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

The Clerk of the Court aforesaid will please prepare a Transcript of the Record on the appeal this day taken by the defendant to the Supreme Court of the United States, and in such Transcript will include the following pleadings and proceedings, to wit:

1. The original bill of complaint, filed April 22, 1904.
2. The answer of defendant, filed January 3, 1908.
3. Complainant's Exceptions to said answer, filed February 12, 1908.
4. Opinion of the Court sustaining the same, filed February 13, 1909.
5. Final Decree for complainant, entered February 23, 1909.
6. Petition of Appeal, Appeal Bond, and Assignment of Errors filed this day.
7. Order allowing appeal and approving bond, showing that the same was done in open Court.

And as soon as said Transcript is completed will please transmit the same to the Clerk of the Supreme Court.

N. B. K. PETTINGILL,
Solicitor for Appellant.

16 District Court of the United States for Porto Rico.

Equity. 253, San Juan; 206, Mayaguez Division.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

I, John L. Gay, Clerk of the District Court of the United States for Porto-Rico, do hereby Certify the foregoing fifteen type-written pages, numbered from 1 to 15 inclusive, to be a full, true and correct copy of the record and proceedings of the above entitled cause requested in the præcipe of defendant-appellant, copy of which is included in this transcript, as the same remain of record and on file in the office of the Clerk of the aforesaid Court.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States for Porto-Rico, at this 23d day of March A. D., 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk Dist. Court of U. S. for P. R.

Endorsed on cover: File No. 21,583. Porto Rico D. C. U. S. Term No. 408. Robert H. Todd, appellant, vs. Higinio Romeu. Filed April 2d, 1909. File No. 21,583.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 408.

ROBERT H. TODD, APPELLANT,

vs.

HIGINIO ROMEU, APPELLEE.

BRIEF FOR APPELLANT.

N. B. K. PETTINGILL,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 408.

ROBERT H. TODD, APPELLANT,

vs.

HIGINIO ROMEU, APPELLEE.

BRIEF FOR APPELLANT.

Statement.

This is the second time this case has appeared in this court. The first appeal was taken by Romeu, the original complainant, now appellee, from a decree dismissing his bill of complaint upon demurrer sustained thereto, after he had declined to amend (206 U. S., 358). The cause was reversed and remanded for further proceedings, which of course involved vacating the decree dismissing the bill, overruling the demurrer and requiring the defendant to answer.

Upon the receipt of the mandate of this court, the proper orders were made, the defendant filed his answer and thereafter complainant filed exceptions thereto. These exceptions were sustained, defendant was permanently enjoined and a decree was entered in favor of the complainant in this regard. From this latter decree defendant, appellee in the previous appeal, has become appellant.

Although a full statement of the contents of the bill of complaint appears in the former opinion of this court, the rule regarding briefs seems to require its repetition here, and for that purpose we adopt the pertinent parts of the statement of this court, contained in that opinion:

> "Todd, in 1901, filed a bill in equity in the United States court for the district of Porto Rico against certain judgment debtors (Agostini) and one Ana Merle for the purpose of enforcing his judgment upon certain real property of which Ana Merle stood upon the public records as the owner. The ground was that the property had been paid for with the money of the Agostinis and was hence liable to be applied to their debts. * * * The court decreed that a certain parcel of land described in the bill had been purchased by Ana Merle with funds belonging to Pedro Agostini, and said Agostini 'was the owner of the equitable and beneficial title of the same.' And it was ordered that, to pay the indebtedness to Todd, the property, with the improvements thereon, be sold at public sale by a commissioner appointed for that purpose. Whilst this suit was pending, before decree, the piece of real estate embraced by the decree was sold by Merle to Higinio Romeu, the plaintiff (now defendant) in error. The present bill was filed on behalf of Romeu against Todd to enjoin the sale of this piece of property.
>
> "The bill alleged the bringing of the Todd suit, the purchase by Romeu pending such suit, the decree rendered therein as above stated, and the fact that the decree was about to be executed. It was averred that the purchase by Romeu had been made for an adequate consideration, with the utmost good faith and without knowledge of the pendency of the Todd suit; that the property, since it was bought by Romeu, had been largely improved by him, and that, as no cautionary notice concerning the Todd suit, as authorized and required by the laws of Porto Rico, had been put upon the record, the property acquired by Romeu under the circumstances alleged was not subject, in Romeu's hands, to the Todd decree."

The bill of complaint is preserved in the present record (pages 1-3), and it is only necessary, in addition to the above, to call attention to an allegation thereof that complainant's purchase was made "after duly employing counsel to examine the title of same," who "reported to your orator that Ana Merle had a good and sufficient title to said land, without any liens of any kind whatsoever."

Upon the restoration of the suit to the docket of the court below, in obedience to the mandate of this court, the defendant was required to answer, and did answer on the 3rd day of January, 1908 (pages 4-5).

The parts of this answer pertinent to the present issue set up the defence that, at the time of complainant's purchase as alleged in his bill, both he and the counsel whom he consulted *had both actual notice and knowledge* of the pendency of the suit of defendant against the Agostinis and Merle, and further

> "that the report of said counsel was made to said complainant with knowledge of the pendency of said suit, but was so given based upon the legal opinion of said counsel that, so long as no notice of the pendency of said suit appeared annotated in the proper Registry of Property, other notice or knowledge of its existence did not affect the validity or completeness of the title which the record owner might convey and a purchaser from such owner might acquire."

During the following month counsel for complainant filed exceptions to that part of the answer containing the above defence, upon the ground of impertinence (pages 5-6)

> "for the reason that the matters and things alleged in said paragraph do not under the laws of Porto Rico constitute any defence to the complaint of plaintiff or to any part thereof."

One year later, February, 1909, the court rendered its opinion on these exceptions, sustaining them, and in the course thereof explained his views as follows (page 7):

"We have examined the opinion of the Supreme Court of the United States above referred to with great care, and whilst there may be cases in which the knowledge of counsel examining the records, or of the purchaser of lands, of the pendency of a suit regarding the land might be binding upon the purchaser, still we do not think that this is a case where that rule would apply.

"In our opinion, it is unnecessary to hold, although we are inclined to believe that such is the law, that in Porto Rico, under the mortgage law, an intending purchaser is not bound by any equities or rights of others regarding real property save where a cautionary notice is actually inscribed in the Registry of Property.

"For this reason, we hold that the exceptions to the answer must be sustained and, as in our opinion from our knowledge of the case it would be useless thereafter to proceed with the same, a decree will be prepared relieving the said property from all lien of the Todd judgment, and making the injunction perpetual if necessary, and decreeing all of the costs including those made necessary by the mandate of the Supreme Court, against the respondent Todd, and it is so ordered."

In accordance with the direction of that opinion, a final decree was entered on the 23rd day of February, 1909, whereby defendant, appellant in the present appeal, was perpetually enjoined from enforcing any lien or claim upon the property described in the bill by virtue of his decree against the Agostinis and Merle (page 8). Defendant took and perfected his appeal in the usual form, and in open court, from that final decree (pages 9-11), and the assignment of errors, which in effect raise the question of the correctness of the above ruling on complainant's exceptions to our answer, is as follows (pages 9-10):

Assignment of Errors.

"1. The court erred in sustaining the exceptions filed by complainant to the answer of the defendant.

"2. The court erred in holding that complainant was entitled to a decree upon the bill and answer after said exceptions were sustained.

"3. The court erred in entering a final decree in favor of the complainant."

ARGUMENT.

There is but one question before the court on this appeal, and that is: What is the law of Porto Rico as to the effect of bringing home to an intending purchaser of real estate knowledge or notice of a defect in the title to, or of a lien upon, such real estate in favor of some person other than the vendor, where such knowledge or notice is *not* required from the Registry of Property, such defect or lien not being recorded? Or, to state it in another way: Is an intending purchaser of real estate in Porto Rico permitted by the law to ignore knowledge actually possessed or acquired by him, otherwise than from the Registry, before completing his purchase that the title to, or a lien upon, such property in fact exists in favor of a person other than the proposed vendor, and, after completing his purchase with such knowledge, defeat the right of such other person to enforce his title or his lien by saying: "I may have known of your claim, but whether I did or not is immaterial, for I went to the Registry of Property and saw that no such claim was there recorded and that the party from whom I have since purchased had a clear and unencumbered title by that record; therefore I had a right to make my purchase from him,

and the fact that your claim was not recorded relieves me of any liability to you upon it, even if I knew all the time of its existence and validity."

If such is the law, it is time that its existence be directly and judicially declared by the highest court of the land, so that Congress may be asked to remedy it and to establish in Porto Rico the enlightened jurisprudence of our own country.

It will be seen from the extract above quoted from the opinion of the court below that it evaded a clear declaration on the question, and purported to base its conclusion, at least in part, on the former opinion of this court. Still, in those paragraphs that court did not give us much information as to the reasons for its conclusion. And perhaps necessarily so, for even an examination with great care of the former opinion of this court will, we believe, fail to discover any logical bearing it can have upon the question raised by the exceptions to our answer. The statement in that opinion of the facts alleged in the bill brought out clearly the complainant's claim of being an *innocent purchaser for value,* as the term runs in our law, and the very next statement of the court is that—

> "The court below, in its opinion, assumed that, under the local law, a third party *in good faith* purchasing from or dealing with the registered owner of real estate, *without notice in fact* of the existence of a pending suit concerning the title to property, was not to be treated by operation of law as *constructively* notified of the pendency of the suit unless the cautionary notice which the law of Porto Rico required to be put upon the record was given." (Italics ours.)

And later on:

> "That the essence of the statute was the protection of innocent third parties dealing with the recorded owner when no cautionary notice had been given is obvious."

And each time the facts were adverted to this court was careful to use the term 'innocent" purchaser or party—which the complainant was, according to the allegations of his bill. And of course these allegations were admitted by the demurrer for the purposes of the issue to be decided thereon.

But when those allegations which constituted the complainant an innocent purchaser were denied by the answer and the counter allegation made that complainant "had both actual notice and knowledge" of the pendency of the suit, the *ratio decidendi* of the former opinion disappeared, and that decision ceased to be applicable to, or to have any bearing upon, the new issue thereby raised.

Having then, as we believe, removed the "bogie" of the former decision from our path, we proceed to inquire what the law of Porto Rico really is upon the question of purchasers with notice.

And, in the outset, it is to be remarked that the question now in issue is not confined to notice from some unrecorded or unregistered document or writing, although we believe the principle covers all kinds of notice. The contention is for the right to defend by proving any material knowledge or notice even though resting wholly *in pais*. And we expect to go to the extent of proving by decisions of the highest courts both of Spain and of Porto Rico itself (not referring to this court under its appellate power, as this is the first time the question has been squarely presented here) that the term "third persons" (terceros) as used in the Spanish law is in all material respects the equivalent of the phrase "innocent purchaser for value without notice," using the word "purchaser" in a broad sense as one who has acquired some interest in the subject matter of the controversy.

The articles of the Mortgage (or recording) Law, which are material to this inquiry, and which may be referred to in some of the cases hereinafter cited, are the following, as translated in the War Department edition of 1899:

"ART. 2. In the Registries mentioned in the preceding article shall be recorded:"

(Six subdivisions enumerate classes of conveyances and other property rights, not material to specify.)

"ART. 23. The instruments mentioned in articles 2 and 5 which are not duly recorded or entered in the Registry can not prejudice *third persons.*

"ART. 25. Recorded instruments shall be effectual against *third persons* only from the day of record.

"ART. 27. For the purposes of this law, those who have not participated in the recorded instrument or contract shall be considered as *third persons.*

"ART. 33. The record of instruments or contracts which are null in accordance with the law are not validated thereby.

"ART. 34. Notwithstanding the statements contained in the preceding article, the instruments or contracts executed or covenanted by a person who, according to the Registry, has a right thereto, shall not be invalidated with regard to *third persons,* after they have once been recorded, although later the right of the person executing them is annulled or determined by virtue of a prior deed not recorded, or for reasons which do not clearly appear from the Registry.

"Only by virtue of a recorded instrument may another later instrument, also recorded, be invalidated to the prejudice of *third persons,* with the exceptions mentioned in article 389.

"ART. 35. A prescription which does not require a just title shall not prejudice *third persons* if its possessory title is not recorded.

"Neither shall a *third person* be prejudiced by a prescription which requires a just title if the latter is not recorded.

"ART. 36. Suits for rescission or determination of title shall not be instituted against *third persons* who have recorded the instruments of their respective interests in conformity with the provisions of this law.

"ART. 42. Cautionary notices of their respective interests in the corresponding public registries *may be* demanded by:

"1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right."

(Followed by nine other subdivisions.)

"ART. 69. The person who may demand a cautionary notice of an interest and should not do so within the period prescribed for this purpose can not have it entered subsequently in his favor to the prejudice of a *third person* who may have recorded the same interest, having acquired it from a person who, according to the Registry, was competent to convey it.

"ART. 99. The cancellation (of the entry of a cautionary notice) may be declared null, but not to the prejudice of *third persons,* in accordance with the provisions of article 97:"

(Followed by three subdivisions, not material to specify. All italics ours.)

We have quoted from the Mortgage Law so largely in order to show the material articles in their context, as well as to call attention to the applicability of the term sometimes applied to it as the "law of third persons."

See Valdés *vs.* Valle *et al.*, 1 Dec. de P. R., cited in Appendix.

From article 42 above it will be seen that cautionary notices are *permitted,* not *required.*

Sections of the Civil Code of 1902 having more or less correlation with the preceding are as follows:

"SECTION 612. The Registry of Property has for its object the inscription and annotation of the documents or contracts relating to ownership and other real rights on immovables.

"SECTION 613. The title of ownership or of other real rights relating to immovables which are not properly inscribed or annotated in the Registry of Property shall not be prejudicial to third persons.

SECTION 614. The Registry of Property shall be public, for the purpose of ascertaining the condition of the immovables or real rights annotated and inscribed.

"SECTION 615. In order to determine the titles subject to annotation or inscription, the form, effect and extinction of the same, the manner of keeping the registry, and the value of the entries contained in the

books thereof, the provisions of the Mortgage Law shall be observed.

"SECTION 1258. The following may be rescinded:

* * * * * * *

"3. Those executed in fraud of creditors, when the latter can not recover, in any other manner, what is due them.

"4. Contracts relating to things in litigation should they have been executed by the defendant without the knowledge and approval of the parties in litigation or of the competent judicial authority.

"SECTION 1262. Rescission obliges the return of the things which were the objects of the contract, with their fruits and the sum with interest; therefore it can only be carried into effect when the person who may have claimed it can return that which, on his part, he is bound to do.

"Neither shall rescission take place when the things which are the object of the contract are legally in the possession of *third persons* who *have not acted in bad faith*. In such case the indemnity for damages may be claimed from the person who caused the lesion.

"SECTION 1265. Any person who may have acquired *in bad faith* things alienated in fraud of creditors must indemnify the latter for the losses and damages caused to them by the alienation whenever, for any reason whatsoever, it should be impossible for him to return them." (Italics ours.)

The present controversy, however, has directly to do with the construction of the above-quoted article 34 of the Mortgage Law, especially with reference to the phrase "third persons" as used therein. This phrase clearly has the same meaning each time it is so often repeated in this law. Once that meaning is properly defined, the limit of applicability of that law will be plain. Then it will only remain to bear in mind that, the Mortgage Law aside, the principles of the ordinary law are applicable, such, for instance, as the sections of the Civil Code above quoted and others applied in some of the cases to be cited—all which sections, it may be

suggested, are unaltered from the provisions of the same Code in force prior to the year 1902, the numbering of the sections only being changed in the revision of the Code.

An illustration of the above statement may be aptly taken from a decision involving the limitation for bringing an action by creditors to set aside a fraudulent conveyance. The general limitation of actions for rescission of contracts is four years (Civil Code, sec. 1256; Old Code, art. 1299); while article 36 of the Mortgage Law provides that such suits "shall not be instituted against *third persons* who have recorded the instruments," etc., and article 37 states certain exceptions to the preceding and then says: "In both cases the *third person* shall not be prejudiced by any action for rescission not brought within *one* year." Explaining the distinction in the application of these two laws, the Supreme Court of Spain, in a decision reported in "Jurisprudencia Civil de España," volume 78, page 261, said, as translated into English:

> "As to the third ground of appeal, it is adjudged that the limitation of actions for rescission of one year, reckoning from the date of the fraudulent conveyance, has been established by article 37 of the Mortgage Law clearly and expressly in favor of third persons, that is, according to the definition which article 27 gives of this expression, in favor of those who have not taken part in the act or contract inscribed; it being therefore unquestionable that that advantage does not include appellant, since he is not a third person and cannot be considered as such as to the sale, the rescission of which was demanded by his adversary, as he took part in it in the capacity of purchaser; and that, therefore, the court below has not committed the error of law which is attributed to it upon its having disallowed the defence of prescription by the lapse of one year, and upon its holding that the right of action claimed in the suit is not barred until *four* years, *in accordance with the provisions of article* 1299 *of the Civil Code, which is applicable in general to all actions for rescission*, except as specified in said article of the Mortgage Law in favor of third persons." (Italics ours.)

The same is also illustrated and confirmed by the language of the Supreme Court of Porto Rico in Valdés *vs.* Valle, quoted in the appendix hereto.

The court will have noticed that article 27 of the Mortgage Law itself gives a definition of "third persons," as quoted in the above decision from the Supreme Court of Spain, but the translation of the Spanish by the phrase "participated in" evidently does not convey their full meaning, as will be seen from the dicisions now to be referred to. In previous briefs in this court we have adopted the method of quoting paragraphs from Spanish decisions in the original Spanish, then following the same with our own translations thereof; but as we wish in this instance that the court may have before it certain decisions entire, as well as various extracts from others, and as the decisions of the Spanish courts are seldom short, we have obtained official translations of the decisions and extracts which we now wish to cite and, as the material parts of all refer to the same point, have attached them, thus translated, as an appendix to this brief, to which we beg the court's special attention. At the same time we have presented the typewritten translations, with the original certificate of the official translator attached, to be placed on file with the record in the case for reference by the court, if desired.

Some of the cases quoted naturally involve other questions and each case presents its differing aspect of facts, but to the point in controversy those courts have uniformly applied the same principle, to wit: that, in order to be entitled to the protection accorded by the Mortgage Law to a "third person," it must appear not only that he was not a participant in the transaction about which the question of notice arises, but also that he was without knowledge or notice thereof, that is, that he was an "innocent third party without notice." Some cases will be found in which the definition of "third person" has been confined to a mere repetition of the words of article 27, but wherever that occurs a study of

the statement of facts will show that no question of knowledge or notice apart from the registry was involved.

In addition to the cases in the appendix, the court may consult the following:

Juris. Civil de España, vol. 58, page 460; vol. 102, page 390.

From all these cases we submit it conclusively appears that the answer to the questions propounded at the opening of this discussion must be in the negative, and that any proper and sufficient proof of notice, which would be sufficient to destroy the good faith of an intending purchaser and make it equitable that he be charged with the claim or lien of a person other than his vendor, will under the Spanish law, and the Mortgage Law, result in his being so charged.

We leave those cases and the conclusion to be drawn from them to the consideration of the court without further discussion.

It may also be shown, although not material, we believe, in this case that in the jurisdictions of those States of the Union which have derived their systems of jurisprudence from the Civil Law, the same rule prevails, as to which, see the following cases:

Sampson *vs.* Ohleyer, 22 Cal., 200, 211.
Sharp *vs.* Lumley, 34 Cal., 611, 615.
Wise *vs.* Griffith, 78 Cal., 152.
Christie *vs.* Sherwood, 113 Cal., 530.
Hibernia Soc. *vs.* Lewis, 117 Cal., 577.
Splane *vs.* Mitcheltree, 2 La. Ann., 265.
Bach *vs.* Abbott, 6 La. Ann., 809.
Swan *vs.* Moore, 14 La. Ann., 833.
Brian *vs.* Bonvillain, 52 La. Ann., 1794, 1806.

In Louisiana the rule seems to be different as to the effect of notice of unrecorded mortgages, or of those not reinscribed as required by law; but that is clearly the result of an

unusual statutory provision, and does not affect the application of the ordinary rule otherwise.

Ridings *vs.* Johnson, 128 U. S., 212.

Lacassagne *vs.* Chapuis, 144 U. S., 119.

We confidently submit that the decree of the court below should be reversed and the cause remanded with directions to overrule the exceptions to the answer of appellant.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellant.

APPENDIX.

SUPREME COURT OF SPAIN.

(SENTENCIA OF JAN. 11, 1895.)

From the Audiencia of Cáceres.

LUIS SIMÓN
vs.
FRANCISCO GUNDÍN ET AL.

(First "*Considerando.*")

"Although this Supreme Court has held that, in accordance with articles 2, 13, 23, 25, and 27 of the Mortgage Law, instruments in which property rights are created or acknowledged must be recorded in the Registry of Property, and servitudes must be made especially to appear in the record of dominant and servient estates, without which requisite such records will not prejudice third persons; and that prescriptions of such rights can produce no effect with respect to third persons, according to article 35 of said law, unless the title or possession thereof is recorded; it is also a *doctrine repeatedly announced* in different decisions that for the purposes of said law *a person cannot be considered a third party, who,* having had no intervention in the instrument or contract recorded, *had knowledge, upon the acquisition of the property in his possession, of the incumbrances existing thereon,* since one of the principal bases and objects of the Mortgage Law is to secure the publicity of encumbrances affecting real estate in order that no one may be responsible for an incumbrance of which he had no knowledge, and *ignorance cannot be alleged with respect to a thing about which a person has full knowledge.*

This doctrine is applicable to Luis Simón, who, not-

withstanding the fact that he acquired the Las Cerradas mill free from all incumbrances, recording his title in the registry, and although the possession of the servitude recognized by the judgment appealed from was not recorded in favor of the Hondonero mill, he cannot claim the character of a third party denied him by the said judgment, because of the servitude being so evident and manifest, as the trial court expresses it, by reason of the visible age of the fishery and canal which catch and carry the waters from the Trevejana bank to the Moncalvo River, where the necessary currents join to run the Honodero mill, the said mill, as well as the fishery and canal, having been in existence from time immemorial; whereas it appears that the Las Cerradas mill was constructed many years later. And as the judgment appealed from definitely states that during the time in which the plaintiff was a co-owner in the Honodero mill he used the waters from the river, it is evident that he used them by virtue of said servitude, and that, on acquiring the Las Cerradas property, he had knowledge of the existence of the incumbrance affecting and the rights appertaining to the dominant estate to utilize other waters as well as the fishery and the canal, and in the recognition of this right the trial court did not violate article 35 of the Mortgage Law nor the other articles cited in the first and fourth grounds of appeal."

Juris. Civ., vol. 77, pp. 56, 69.

SUPREME COURT OF SPAIN.

(SENTENCIA OF FEB. 7, 1896.)

From the Audiencia of Madrid.

VICTOR SÁINZ
vs.
FRANCISCO TEJEDA.

(Fifth "*Considerando.*")

"According to the jurisprudence established in a great number of decisions rendered by this supreme

court and very particularly in the judgment rendered January 11, 1895, a person cannot be considered as a third party for the purposes of the provisions of articles 2, 13, 23, 25, 27 and 35 of the Mortgage Law, who, although not having intervened in the instrument or contract recorded nevertheless had knowledge, upon acquiring the property in his possession, of the incumbrances existing thereupon, which doctrine is entirely applicable to the present case since, as hereinbefore stated, the contracting parties on the acquisition by Victor Sáinz of the house on Salitre street which he owns, was satisfied with the fact that the house numbered 23 should have windows in the walls adjoining the other house. So that the purchaser, Sáinz, cannot successfully allege ignorance thereof, nor can he be considered as a third party; from all which it is clear that no provision whatever of the Mortgage Law cited in the appeal has been violated by the judgment from which this appeal is taken."

Juris. Civ., vol. 79, pp. 252, 260.

SUPREME COURT OF SPAIN.

(Sentencia of May 13, 1903.)

From Audiencia of Barcelona.

Rafael Tosquella
vs.
Joaquin De Mercader.

(Translated in full from the beginning of the findings of fact.)

"In the will dated May 28, 1876, left by Maria de los Dolores Caballero y Barco on her death, she constituted as her sole and universal heirs in equal parts her children Luis, Joaquin Maria, Maria de los Dolores, and Laura de Mercader y Caballero, the first of whom, that is to say, Luis de Mercader, the defendant in the case at bar, assigned to his father, the widower of the deceased, and now the plaintiff and respondent, Joaquin Mercader y Belloch, Count of

Belloch, the fourth part of the property so acquired according to a deed executed before the Notary Public Pío Mas y Ribot on November 2, 1894, and recorded in the Registry of Property of the western district of Barcelona on November 22, 1897.

"Prior to the last date, that is to say, on September 10, 1895, Luis de Mercader y Caballero executed before the Notary Public Francisco Pascual y Elias another deed which was recorded in the western and eastern Registries of property of Barcelona, in the first on December 24, 1895, and in the second on January 24, 1896, and by the said deeds Don Luis constituted a voluntary mortgage upon various properties, and among them several of the undivided interests in the real estate and property rights which he had inherited from his mother, in favor of Rafael Tosquella Perera and Martin Carcasona Bosons, to guarantee a loan of 8,625 pesetas with interest at 8 per cent per annum and for 6,500 pesetas for expenses and costs in case it were necessary to institute judicial proceedings for the collection of the loan, that is to say, 3,500 pesetas for expenses and 3,000 for costs, under several conditions unnecessary to state.

"Rafael Tosquella and Martin Carcasona not having been paid the amount of the loan when due, filed an executory action for the recovery thereof on the 25th of March, 1896, before the court of first instance for the northern District of Barcelona, against Luis de Mercader. The proceedings were duly prosecuted up to the advertisement of sale of the property mortgaged and attached, at public auction, and at this stage of the proceedings Joaquin de Mercader Belloch, Count of Belloch, on November 26, 1897, appeared and filed a declaratory action of greater import against the execution creditors, Tosquella and Carascona, and against the execution debtor, that is to say, his son Luis de Mercader y Caballero in intervention of ownership. And availing himself of the real and personal actions which he alleged pertained to him, he prayed that the executory proceedings be stayed and that in due time the court should render judgment declaring Joaquin Mercader to be the owner

of an undivided fourth interest in the estate of Dolores Caballero, which by virtue of her will executed by her she left to her son Luis, and in consequence thereof that the said fourth interest should be excluded from the public sale as belonging to said Joaquin de Mercader for the reason that he is not obliged to pay the debts contracted by the said Luis de Mercader after the assignment made by him to the plaintiff, and that the proper orders be definitely issued to the Registrar of Property in order that he cancel or annul the inscriptions or records made in the books of the registry concerning the mortgage deeds and attachment which the execution creditors are endeavoring to sustain upon the aforesaid undivided fourth interest in the inheritance, and that they or any other person opposing the complaint in question be required to pay the costs and an indemnity to cover damages and losses.

"In support of these claims the Count of Belloch alleged that as it appeared from the deed of November 2, 1894, introduced by Luís Mercader, the latter assigned him an undivided fourth interest in the properties mentioned in the inventory which was made for the purpose, and which the said Luís Mercader had acquired by inheritance from his mother; that as appeared from the result of the executory action the said Luís de Mercader, after the execution of the deed hereinbefore referred to, mortgaged in favor of Rafael Tosquella and Martin Garcasona the same properties that he had already assigned to his father; that when he acquired from his son the said fourth interest in the estate the only incumbrance upon the properties composing the same was a mortgage for 10,000 pesetas principal and 5,000 pesetas to cover cost and expenses, the same being constituted by Luís in favor of his brother Arnaldo Mercader to guarantee the payment of a loan of 50,000 pesetas made by the latter to the former; that the credit shown by Tosquella and Carcasona as well as the mortgage guaranteeing the payment thereof are of a later date than the assignment shown by the plaintiff, since the assignment was made in the year 1894 and the mortgage in 1895; and that when the prop-

erties which are about to be sold at public auction were given as a guarantee or mortgage to the execution creditors, now the defendants Rafael Tosquella and Martín Carcasona, Luís Mercader was not the owner thereof, he having assigned the same to Joaquin Mercader, who in addition to the foregoing cited the law applicable to the case.

"An incidental issue for a prior and special decision in regard to the nullity of the proceedings had, filed by Tosquella and his fellow litigant Martín Carcasona, having been decided against them on August 24, 1899, they filed their answer to the complaint praying that the same be dismissed with costs, and a synthesis of their allegations is as follows: That on the 10th of September, 1895, the defendants and Luís de Mercader executed the contract for the loan of money on file in the record of the executory proceedings which is the origin of this complaint in intervention; that to guarantee the payment of the loan the latter constituted a mortgage in favor of the former upon the property belonging to the said Don Luís, which he had inherited from his mother Dolores Caballero; that the deed in which the aforesaid contract was made was recorded in the Registry of Property on December 26th of the year of its execution, it appearing at the present time from the books of the said office that the borrower Mercader y Caballero was the sole owner of the properties mortgaged; that upon the filing of the executory action for the recovery of the said loan, and when, after the attachment had been levied upon the mortgaged properties, the public sale was advertised, Joaquin Mercader filed the present complaint in intervention of ownership, and asking that he be declared the owner of the properties attached and mortgaged to guarantee the payment hereinbefore repeatedly referred to; that the Count of Belloch bases his right upon the deed of assignment of the mortgaged properties which he claims are the same ones that were assigned to him, defendants being unable to admit this under the statement of the plaintiff himself; that the plaintiff also bases his action on the alleged priority of the assignment to the mortgage, but the inscription or

record of the said deed of assignment appears to be dated two years later than the date of the execution of the mortgage; that it is therefore evident that the defendants Tosquella and Carcasona acquired their property right their title to which they had recorded in the Registry of Property, that is to say, they thereby had the ownership of the mortgaged property; that the assignment referred to cannot prejudice the defendants because they had no intervention whatever in any such contract they being third parties with respect to the same; that as it appeared from the registry that the properties were recorded in favor of the debtor on the constitution of the mortgage, defendants denied that Luís Mercader was not the owner thereof; that negligence or any other cause which might have prevented the inscription of the deed of assignment in the Registry of Property cannot cause the interests of either of the defendants to be prejudiced, since it is well known that the transfer of property rights must be recorded, and that failure to comply with a provision (of the law) cannot be invoked; that the complaint in intervention should not have been admitted under the circumstances because in executory actions the object of which is to recover a mortgage loan recorded in the Registry of Property, a third party cannot deprive an execution creditor of his rights unless his claim is based upon a title recorded in the Registry of Property on a date prior to the mortgage; and that as this condition does not exist with respect to the plaintiff in intervention, Joaquin Mercader, he was entirely without a right of action in the present case. After making the foregoing allegations, defendants advanced such legal arguments as they deemed proper in support of their claims.

"The plaintiff, the Count of Beloch, in his replication insisted upon the prayers contained in his complaint and added thereto substantially the following facts: That Don Joaquin on April 9, 1894, presented in the Registry of Property for the western district a deed of assignment executed in his favor, but it having been necessary in another suit to use the inventory of the properties left by Maria de los

Dolores Caballero, and which inventory was attached to the said deed, he found it necessary to withdraw the deed without recording his right; that afterwards on several occasions he asked for the return of the said inventory in order that he might again present it at the registry together with the deed of assignment so that the record might be made, and that the court had always refused to return it on the ground that the document referred to was of considerable importance in the decision of the litigation above referred to; that Joaquin de Mercader was thus prevented from obtaining the inscription of his title, and that Luís Mercader as well as the partners Tosquella and Carcasona, having knowledge of these facts, agreed among themselves to execute the deed on September 10, 1895, that is to say the deed upon which the executory action filed by the latter against Don Luís is based; that the said contract was entered into without the knowledge of the plaintiff in intervention, Don Joaquin, the parties to the said contract being confident that they could derive gain to the prejudice of the said plaintiff in intervention from the advantages they expected to obtain, under the character of third parties provided for by the Mortgage Law, from the inscription which they were about to secure; that Joaquin de Mercader, having been notified, by the publication of edicts announcing the public sale of the properties, of the existence of the executory action, he suspected the intervention of some one in the matter, and Pedro David being afraid that suspicion might fall upon him wrote to the plaintiff's son, Don Arnaldo Mercader, telling him among other things in the letter attached, that he sincerely regretted that he should believe that it was he who got Tosquella and Carcasona to secure the amounts lent to Don Luís by a mortgage on the property derived from his inheritance from his mother, and which was already assigned to his father; that the said David had neither little or much intervention in the transaction; that the lenders were aware before the execution of their deed that Don Joaquin did not have his deed of assignment recorded; that by reason of this fact Tosquella and Carcasona were sure that they would be able to obtain a guarantee for the

amounts lent by them to Don Luís and which they agreed to deliver to him as soon as they should derive the advantages over the Count by means of the inscription; and that this was so much so that Tosquella had told David the facts, charging Don Joaquin with negligence in allowing his son to make him the victim of his deceipt. These allegations were denied by Tosquella and Carcasona in their prayer and they reiterated the prayers contained in their answer to the complaint.

"After Luís de Mercader y Caballero had been declared in default the case was declared open for taking the evidence, and that which was introduced was attached to the record and the parties made a resume thereof, and the court of first instance for the northern district of Barcelona rendered judgment on the 8th of June, 1901, holding that Don Joaquin de Mercader y de Belloch, Count of Belloch, is the owner of the undivided fourth interest in the properties composing the estate of Dolores Caballero y Basco which she left to her son Luís Mercader y Caballero, and therefore excluded the said fourth interest in the properties attached and ordered sold in the executory proceedings prosecuted by Rafael Tosquella and Martin Carcasona against Luís de Mercader y Caballero, because the said undivided fourth interest in the said properties could not be held to guarantee the payment of debts contracted by Luís de Mercader upon a date later than the assignment of the said undivided fourth interest in the estate made by Luís Mercader in favor of his father Joaquin Mercader, by public deed executed before the notary of that city Pío Más, on November 2, 1894, and consequently it was likewise declared that the mortgage constituted by the said Luís de Mercader in favor of Rafael Tosquella and Martin Carcasona in the deed executed before the notary public Francisco Pascual on September 10, 1895, the proper order being issued in duplicate to the Registrar of Property for the western district of Barcelona, for the cancellation and annulment of the records made of the said deed constituting the mortgage upon the said undivided fourth interest in the properties, and also for the cancellation of the caution-

ary notice of attachment levied upon the said undivided fourth interest in the said properties, entered in the Registry of Property, reserving to the said Rafael Tosquella and Martin Carcasona the right to proceed against Luís de Mercader in any manner they may deem proper, without making any special imposition of the costs; this judgment being also affirmed, without any special imposition of costs in the second instance, and on appeal taken by Rafael Tosquella and Martin Carcasona, by the first court of civil actions of the 'Audiencia Territorial' of Barcelona in its judgment rendered April 10, 1902.

"Rafael Tosquella y Perera after depositing 1,000 pesetas has taken an appeal in cassation for violation of law contained in paragraph 1 of article 1692 of the Code of Civil Procedure alleging:

"First. That the trial court violated article 34 of the Mortgage Law in so far as it declares null and void the mortgage constituted by Luís Mercader in favor of Rafael Tosquella and Martin Carcasona, on the ground that the former did not have the free disposal of his properties from the time in 1894 that he assigned them to his father Don Joaquin, to the effect that the said Tosquella and Carcasona having contracted with the person who appeared upon the registry as having the right to do so, the property mortgaged appearing in his name, neither the mortgage itself nor the mortgage contract can be rendered invalid, although the right of the party that executed the same is null and void, since such nullity is declared by virtue of a title which, although prior to the mortgage is not recorded in the registry, and for causes which did not appear in the registry itself; and

"Second. The violation by said court of article 25 of the Mortgage Law where, in providing that titles shall have no effect against a third party except from the date of their inscription, it superadds to the force and effect of the mortgage made in 1895 another inscription of ownership not made until 1896—so it says—it being impossible to deny to Rafael Tosquella and Martin Carcasona the character of third parties in the title of ownership, since they had no intervention

in its execution and had no knowledge thereof when they entered into the contract with Luís de Mercader.

"Mr. Justice Ildefonso Lopez Aranda delivered the opinion of the court.

"The meaning and the spirit of article 34 of the Mortgage Law is not so absolute, according to the jurisprudence of this Supreme Court, as to qualify as a third party a person who contracts a loan secured by a mortgage upon real estate, knowing that it has been previously conveyed or transferred by the person with whom he contracts, even though this fact does not appear in the Registry of Property, provided that such knowledge has been revealed by acts of the person acquiring the property, or by facts the signification of which cannot fail to be known, and which demonstrate his assent, because on such a hypothesis there is no foundation or reason in law for giving to this knowledge such legal importance without diminishing the effect of the absolute provision of the mortgage law, one of the principal objects thereof being that of giving publicity to the charges, incumbrances, and liens upon the real estate, to the end that no person may be held responsible for the same without knowledge thereof, and it being beyond question that according to said law he who, although without participation in the act or contract, had full knowledge thereof, cannot be considered as a third party. This doctrine is in conformity with the principles of law according to which there can be no denial of what has been accepted without protest or expressly or tacitly assented to.

"It having been declared proven by the trial court that Rafael Tosquella and Martin Carcasona had knowledge of the fact that the properties which Luis de Mercader gave them as security for the loan by deed signed by him on September 10, 1895, did not belong to him, but to his father Joaquin Mercader, to whom he transferred them by deed of November 2, 1894, no proper objection having been raised on appeal to this finding or estimation of the evidence, the judgment from which this appeal is taken properly applies the doctrine hereinbefore set forth, and in refusing to consider the appellants as third parties

with respect to the contract of assignment or conveyance of properties made by Luis de Mercader in favor of his father Don Joaquin, and in sustaining the complaint in intervention filed by the latter, declaring the mortgage constituted in favor of Tosquella and Carcasona null and void, and ordering the cancellation of the record thereof in the registry, the court has not violated article 25 and 34 of the Mortgage Law as alleged in the two grounds of this appeal, for the allegation of which the hypothetical facts hereinbefore referred to are rescinded from.

"We adjudge that we should dismiss the appeal in cassation taken by Rafael Tosquella y Perera whom we condemn to the payment of costs and to the forfeiture of the deposit made which will be applied in accordance with law. The proper certificate was ordered to be issued to the Audiencia of Barcelona and the report forwarded by it returned."

Juris. Civ., vol. 95, p. 773.

SUPREME COURT OF SPAIN.

(Sentencio of March 24, 1905.)

MANUEL VASQUEZ

vs.

JOSÉ GONZALEZ ET AL.

From the Audiencia of Granada.

Certain real property was conveyed in the year 1892 to Doña Caracciola Usabiaga, the mother of the intervenor and appellant and the wife of Ceferino Vasquez, the deed reciting that the purchase price was paid from her paraphernal property. The deeds were duly recorded.

In April, 1897, Doña Caracciola entered into a partnership with one Pedro Echavarria, one of its objects being the production and sale of salt; and into this partnership as part of the capital Doña Caracciola put the property purchased as

above and gave her husband power to represent her in conducting the partnership business.

In November, 1898, Doña Caracciola sold her interest in the partnership business, including said real property, to one Calimo Fernandez, and this deed was also recorded a few days later. In July, 1899, the latter in turn appointed the same Ceferino Vasquez to represent him as attorney in fact in the business, with power to mortgage, sell, etc. Using that power, Don Ceferino, in September, 1901, sold the interest of Fernandez to the intervenor, Manuel Vasquez, who was the son of said Ceferino, and that deed was also recorded on October, 1901.

At this juncture José Gonzalez, one of the appellees, brought a suit for recovery of money from Ceferino Vasquez and attached this property as belonging to the latter; whereupon the son, Manuel Vasquez, on October 19, 1901, brought this "terceria," or intervention, claiming the property as his, and alleging that his father had never been the owner of it, as the registry showed. In his answer to this intervention Gonzalez alleged that all the above transactions about the property were simulated and fraudulent, that the property was not bought with paraphernal assets, but was subject to the ganancial rights of the husband and to his debts, and that his attachment of the same was regular and should be sustained.

The first appellate court reversed the trial court, which had sustained the intervention, and dismissed it, sustaining the attachment and holding that the property was legally subject thereto as belonging in reality to the father, Ceferino Vasquez. Manuel Vasquez then appealed, alleging as one ground of appeal that the decision was inconsistent with the article 34 of the Mortgage Law, "which says with perfect clearness that contracts which are made by a person who appears by the Registry to have a right to make them, once inscribed, shall not be invalidated as to those who should have contracted with such person for a valuable considera-

tion, even though the right of the contracting party may be later annulled or determined by virtue of a prior deed not inscribed for reasons which do not appear clearly from the Registry—a precept which the lower court has overlooked and violated." To which the Supreme Court, in the first paragraph of its legal conclusions, replied as follows:

> "By dismissing the intervention of Manuel Vasquez the lower court has not violated article 34 of the Mortgage Law on which the first ground of appeal is based, because what is provided in that legal precept in favor of a *third person acquiring an interest* demands for its application that the causes of nullity or determination which can affect the contract *should neither appear in the Registry of Property nor be known to him at the time of contracting;* while in the present case those who have participated in the transfer of the property which is the object of the suit not only knew the obligations to which it was subject, agreed upon by Doña Caracciola Usabiaga and Don Pedro Echevarria, for the production and sale of salt, but also acted as her substitute in all her rights and responsibilities, according to the deeds of sale and their inscriptions, for which reason Manuel Vasquez cannot claim the condition of a third person, nor be included, therefore, within the exception of said article, for lack of the legal fiction on which rests the guaranty of the Registry."
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> Juris. Civ., vol. 100, p. 679.

SUPREME COURT OF PORTO RICO.

May 10, 1900.

CLEMENTINA ALBINA VOIGHT
vs.
JULIO RIBAS.

Appeal from Ponce District Court.

"By a public deed dated March 7, 1893, Julio Ribas admitted his indebtedness to Pedro S. Battis-

tini in the sum of $8,000, which he promised to pay on February 28, 1901, and also to pay Battistini interest at 10 per cent on February 28th of each year, making the first payment in 1894, Ribas securing the payment by a mortgage on some real estate belonging to him. A criminal prosecution against Battistini having been begun in the Court of Instruction in Ponce for libel of Ramon Torres Alvarado the above mentioned credit was, on March 21, 1897, attached to the extent of 10,407 pesetas, Battistini agreeing at the time the process was served not to dispose in any manner of the sum attached.

"When the 10 per cent interest on said $8,000, amounting to $800 became due on February 28, 1898, Julio Ribas delivered the same to said Court of Instruction of Ponce, in compliance with its order dated March 2d following, and said sum was deposited in the treasury of the Department of Internal Revenue and Customs of Ponce. On the 4th of the same month and year Battistini executed a deed by which he transferred to Antonio Salas, for the consideration of $1,000 which he acknowledged he had previously received, the mortgage credit which Julio Ribas had executed in his favor by the deed of March 7, 1893, and the annual interest of $800 which had fallen due on the 28th of February ultimo, as well as the interest to become due thereafter, Battistini stating that he had not collected said credit and that he would, therefore, guarantee the correctness of the same.

"On the 14th of July following, that is, 1898, the aforesaid Salas and Battistini appeared before Rosendo Matienzo Cintron, a notary of Ponce, and, the latter producing a certified copy of a power executed in his favor on May 15, 1891, by Clementina Albina Voight, executed an instrument whereby Battistini accepted in the name of Mrs. Voight, in payment of the sum of $1,000 which Salas admitted owing to Doña Clementina, the assignment of the mortgage credit and its interest, due and to become due, which by the deed of March 4th previous Battistini had transferred to said Salas.

"On the same date as the instrument of July 14, 1898, Battistini executed a deed of substitution of

the power which Clementina Albina Voight had given him on May 15, 1901, in favor of several gentlemen, among them Luis Gautier.

"Another installment of interest, amounting to $800, having fallen due on February 28, 1899, the debtor Julio Ribas deposited it in the bank called Credito y Ahorro Ponceño. The Court of Instruction of Ponce having on March 21, 1897, issued an order for the annotation of the attachment made against Battistini, said annotation was suspended on December 3d of the same year for amendable defects, and, the same having been thereafter amended, the order was again presented in the Registry of Property on March 14, 1898, and this annotation was also denied, for the reason that, the period for which the annotation of suspension of the former order was allowed having expired, it had been canceled, and on March 7, 1898, there had been presented in the Registry the deed of the 4th of the same month and year, by which Battistini transferred to Salas the credit referred to.

"By means of a certified copy of the deed of July 14, 1898, and of the substitution of power before mentioned, Luis Gautier in the name of Clementina Albina Voight brought an executory action upon the mortgage against Julio Ribas to compel the payment of the sum of $1,600 resulting from the two years' interest due in 1898 and 1899, and, execution being ordered, the defendant Ribas objected on the ground of falsity in the title upon which it was based and payment of the amount sued for. On November 7, 1899, the District Court of Ponce entered its judgment declaring unfounded the objections made by defendant and ordering the execution to be enforced until payment was made to Clementina Albina Voight of the $1,600 sued for, with interest and costs against the defendant, to whom was reserved the right to bring the corresponding declaratory suit in the premises."

From this judgment the defendant appealed in cassation, alleging the infraction of articles 1462 and 1461 of the Code of Civil Procedure and 1157, 1162, 1165, and 1218 of the Civil Code.

Associate Justice Nieto Abeille, after having stated the foregoing facts, delivered the opinion of the court:

"Although the Mortgage Law is a law of security and looks solely in its provisions to the interest of landed property, it is not possible to suppose it despoiled of the additonal qualities which laws ought to possess, one of which is that it be just; and it would not be so if it should permit that, solely by a strict compliance with its precepts, leaving without compliance those precepts which the very elements of honesty impose, things which an honest conscience disapproves as immoral should be converted into legitimate acts.

"The characteristics of a *third person,* according to the precepts of the Mortgage Law, being founded upon the fact of his not having taken part in the act or contract recorded, and, therefore, upon *the want of knowledge existing in the individual so described,* of the facts which may appear in the Registry, and it not being humanly possible to separate the personality of P. S. Battistini, as such Battistini, from that of Battistini, as the attorney-in-fact of Clementina Albina Voight, it cannot be argued that Battistini, as attorney-in-fact of Mrs. Voight, was in ignorance of what Battistini, as the person interested in the proceedings and contracts previously carried out, knew with regard to the credit assigned; and, therefore, Battistini, as attorney-in-fact of Mrs. Voight, *is not to be regarded in the light of a third person,* in accordance with said law.

"As there existed from the first steps of the trial documentary evidence that in it an effort was being made to accomplish, with the sanction of the articles of the Mortgage Law rigidly and literally applied, a result which rationally ought to be regarded as contrary to justice, the trial court, by not so regarding it, violated the articles of the law and the legal principles specified in the first, second, and third grounds of appeal.

"As the deposit of the sums due for interest was proved, the same not being disputed by the party plaintiff in the execution except as to whether it released the debtor or not, the defense of payment ought

to have been sustained, as a consequence of the conclusions reached in the foregoing consideration, and by not so doing the court has committed the error specified in the fourth ground of appeal."

"And the judgment was reversed by a unanimous court."

1 Castro, Dec. de P. R., 60.

SUPREME COURT OF PORTO RICO.

December 30, 1899.

RAMÓN VALDÉS
vs.
PEDRO DEL VALLE and W. D. NOBLE.

Appeal from the District Court of San Juan.

The facts in this case sufficiently appear from the opinion of the court, which was delivered by Associate Justice Morera Martinez:

"A contract exists from the moment one or more persons consent to bind himself or themselves, with regard to another or others, to give something or to render some service, and it is perfected by mere consent, being from that instant binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, may be in accordance with good faith, use, and law. Therefore, in order for one not to exist, there must be wanting the consent of the parties, the definite object which may be the subject of the contract, or the cause for the obligation which may be established—all which requisites were present in that entered into by Valle with Valdés on the 6th of October, 1898; and, therefore, there cannot be denied to the latter the right which is his and which he is exercising in the suit against Valle, since easements may be established by law or by the will of the owners, and the

lack of title essential to the same may be supplied by a deed of acknowledgment from the owner of the servient tenement, or by a judgment, for the conclusive reason that every owner of real property may establish over it the easements which he thinks fit, according to articles 536, 540, and 594 of the Civil Code in harmony with 1088, 1091, 1254, 1258, and 1261 of the same Code.

"These provisions, and those of article 609 of said Code, demonstrate that, whatever imperfections the document given by Valle to Valdés may contain, they do not prevent the latter from using the right which in it was conceded to him, since, Valle being bound not to impair that right which he might have conceded, he ought to correct all those imperfections of title, as the plaintiff is requesting, in order to utilize and save the title arising from the contract, all the more as Valle offered to present, whenever it should be necessary and Valdés should require it, the deed for his rural farm which he by oversight left at his house, a promise with which he as not complied.

"Deceit and mistake never are presumed and, by the trial court adjudging that it is possible so to presume, it ignores the definition of article 1269 of the Civil Code and the legal doctrine of estoppel *in pais*, since Valle did not make it appear that he made the grant to Valdés because of his having been made to understand that he (Valdés) was acting in conjunction with Noble and González, to whom he had given the same easement previously—a pretext which cannot be admitted, since, not having brought his suit as soon as he imagines he was convinced of it, even in order to clothe with formality and a legal aspect that premeditated method of excusing himself, it is not feasible for said reasons to consider it as the deceit which induced, or the error which was the basis of, the contract, in view of the definite provisions of articles 1263 and 1270 of the Civil Code.

"The object of contracts, as it is defined in articles 1271 to 1273 of the same Code, being all service which is lawful, possible and definite, which latter consists in no other agreement being necessary to determine it, it cannot be considered that the con-

tract made by Valdés with Valle is null, when there exists, as does there exist, the object certain and definite which is the subject of the contract, and because in creating easements by documents executed by the voluntary act of a person, that is, of the owner of the servient tenement, the law does not require a price, as shown by the words 'in the manner and form that he may consider best' of article 594 of the Civil Code, and by the method of acquiring property and rights of ownership specified in article 609, a reproduction of the provisons of law 14, title 31, Third Partida.

"Although according to No. 7 of article 1690 of the Law of Civil Procedure, this Tribunal could not enter into a consideration of the proofs, except when in that consideration (by the court below) there existed error of law or error of fact, if the latter resulted from authenticated documents or papers which might demonstrate the evident mistake of the judge, today, according to General Order No. 118, article 79, the appeal is well founded on that basis for error in the consideration of the whole proofs; and, not having considered all the proofs together, for not having set forth the extract of the oral proof in order to consider it according to the rules of sound judgment nor set forth in proper form the want of effect or the value of the documents presented at the trial, the appeal is well-grounded in that sense, because the trial court destroyed the cohesion and force which one naturally gives to the other, giving decisive value to its statement with respect to the document of the 6th of October, 1898, in order to absolve the defendants—a statement which is rendered discredited and therefore ineffectual, for the reasons above set forth.

"The private documents of the 25th of September and 1st and 5th of November, 1898, presented by Noble with his answer to the complaint, can only have the value which is given them by article 1225 of the Civil Code, that is, between those who have executed them and their privies, because the first two do not conform to the requirement of article 1227, and in the last the notary only certified to having seen, and been present at the placing of, all the signa-

tures subscribed to it; to which it is to be added that, the declarations which that document contains being those of the defendant Valle and of one Dionisio Morales, neither the one nor the other by themselves can destroy the aggregate of the rest of the proof, nor take validity nor efficacy from the other document of the 6th of October, 1898, both on account of not being applicable to the latter article 1223 of said Code, which has reference to articles 20 to 28 of the Law of Notaries and articles 48 to 51 and 60 to 68 of the rules for its administration, the provisions of which do not cover this document, and also because, even conceding the contrary, it would come to be comprehended within the provisions of article 1227, the date of the Valdés document being evidence even against third persons from the very day on which it was inscribed in the Registry and delivered to a public functionary, a fact which gives to it greater value than to those of Noble not possessing that requisite.

"The exact decision as to the action to be brought is not required by article 523 of the Law of Civil Procedure, it being sufficient to infer it from the statement of facts, propositions of law and prayer of the complaint, according to the uniform doctrine of the Supreme Court since the promulgation of said law of procedure. And it being alleged by the plaintiff that Valle imposed upon his property an easement in favor of the former, he has to take the necessary steps to get it recorded; and the complaint being also directed against Noble, upon the allegation that at the time of acquiring the property the latter acquired it subject to the easement because he knew of its existence, and that rights in real property are transmitted with the thing itself; from all that and from the prayer of the plaintiff it is deduced that the suit brought involves for the defendants the recognition of the easement and the obligation of presenting in the Registry the title deeds of the land burdened therewith, executing whatever may be necessary to remedy the defects which prevent that real right from being inscribed. Neither is it necessary for Valdés to seek the nullity nor the rescission of the deed executed by Valle to Noble for that land, because he

stands upon a right recognized and anterior to that of the title of Noble, the defendant, as a consequence of which this latter may be valid and subsisting, but subject to said burden or easement; and, moreover, because of the uniform decisions of the Supreme Court that the principle is inapplicable that a suit cannot be begun against the possessor who has a title more or less secure, recorded in the Registry of Property, without preceding it with another which may be adequate under the forms of law to destroy that title, when the one first begun has no other object than to follow the realty which plaintiff claims, but not involving the question whether the title of defendant is more or less perfect.

"In order to define what parties are third persons according to the Mortgage Law, it is necessary to take into consideration the language employed in the explanation of the motives for the enactment of the original law, stating the considerations which governed the Commission in separating the relations between the parties themselves from the relations with other persons, leaving the former subsisting in harmony with the civil law, independent of any inscription, and subjecting to the provisions of the Mortgage Law those other relations which may affect or can be of interest to outside persons.

"Those persons who can be regarded in general as third persons with respect to each act or contract are by the Mortgage Law separated into two groups: third persons as regards the effects of the civil law and third persons as regards the effects of said Mortgage Law; that is to say, that, if no registered title exists, the civil law governs, whether or not rights in real property independent of inscription arise, whether or not third persons are prejudiced, without the mortgage law entering into it. The latter only controls from the time there exists an act or contract inscribed, third persons with respect to said law and such inscription being determined by the preference and acquisition of rights to their prejudice; but if *they have knowledge of the burdens which encumber the property, and that is proven, they lose their privilege.*

"The very words of the law in its article 27 when it says: "for the effects of this law he is considered a

third person who has not participated in the act or contract inscribed" prove and demonstrate the doctrine above expounded, being corroborated by articles 23, 34, 36, 38, and 69 of the Mortgage Law, and 606 of the Civil Code, which latter is no more than a transcription of article 23 of the former, and because of the title and book in which it occurs it is impossible to give a more extended meaning to the conception of a third person, especially when the Civil Code provides that, if the same real estate should be sold to different purchasers, the dominion over it should be transferred to that purchasing party who has first inscribed it in the Registry, and, when no inscription has been made, the dominion will pertain to him who first *in good faith* takes possession of it, and, for lack thereof, to him who presents the title of earlier date, *provided always good faith exists.*

"The contract from Valle to Noble, dated November 9, 1898, being one of purchase and sale; the defendants agreeing, as is to be inferred from their pleadings, that the property sold is the same against which Valdés is directing his claim; *Noble having knowledge prior to said purchase and sale of the document executed by Valle to Valdés* because he presents with his answer the private document of the 5th of the same month and year, in which Valle states the authorization and concession given Valdés, which is the object of this suit; having acknowledged the document of the 4th of the same month presented by Valdés, and confessing in it said concession and its priority; all these things, together with the advertisement in the Gazette of October 15, 1898, wherein plaintiff solicited the right to utilize the waters of the Rio Plata and the site called 'El Salto,' which the Interior Department published so that within thirty days all who thought themselves prejudiced might oppose said petition; the statement of the 8th allegation of his answer, setting forth that it was because of the promise which Valle made him that Valdés sought said concession; and the declaration of the Notary Valdejuli that he had proceeded to draw up the deed of sale from Valle to Noble, which remained unsigned and unexecuted because reference had been made in it to the grant of ease-

ment made by Valle to Valdés on October 6, 1898—all these facts conclusively prove and demonstrate that he (Noble) had knowledge of the lien which burdened the land bought by him. Therefore, *having knowledge at the time of acquiring the property, or prior thereto, of that lien, he cannot have the character of a third person, whether or not the title to the property was recorded*, according to the settled doctrine of the decisions of the Supreme Court (of Spain)."

1 Castro, Dec. de P. R., 29.

(Two of the justices of the court dissented from the conclusion in this case, but solely upon the point that the suit had not been brought by the plaintiff in the proper *form* to obtain the relief asked, they not expressing any opinion on the other questions decided.)

I, the undersigned, do hereby certify that the translations forming the foregoing appendix, composed of decisions of the Supreme Courts of Spain and Porto Rico, are correctly translated from Spanish into English.

C. R. NEWTON.

I, J. Henri Brown, Assistant Attorney General of Porto Rico, do hereby certify that C. R. Newton, who signs the above certificate, is an expert translator from Spanish into English, now engaged in that work in the office of the Attorney General of Porto Rico.

J. H. BROWN,
Assistant Attorney General.

SAN JUAN, *December* 29, 1909.

TODD *v.* ROMEU.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 408. Submitted January 10, 1910.—Decided April 4, 1910.

In Porto Rico a cautionary notice must be filed in accordance with the local law in order to render an innocent third party liable to dismembership of ownership by reason of purchase during pendency of a suit to set aside a simulated sale. *Romeu* v. *Todd*, 206 U. S. 358.

The right to file a cautionary notice in Porto Rico under the existing mortgage law is not absolute in all cases; in certain classes of cases

the right but depends on an express permissive order of the court, and one having knowledge of a suit to dismember title of his grantor in which such order is not a matter of right and no such order is applied for or granted is not bound because he had general knowledge of the pendency of the suit.

Quære, whether one buying property in Porto Rico with actual knowledge of pendency of a suit to dismember title for fraud in which the law gives an absolute right to a cautionary notice without the prerequisite of judicial permission would be liable for the ultimate result of the suit even if no cautionary notice were registered.

THE facts are stated in the opinion.

Mr. N. B. K. Pettingill for appellant:

There is but one question before the court on this appeal, and that is: What is the law of Porto Rico as to the effect of bringing home to an intending purchaser of real estate knowledge or notice of a defect in the title to, or of a lien upon, such real estate in favor of some person other than the vendor, where such knowledge or notice is not required from the registry of property, such defect or lien not being recorded? Or, to state it in another way: Is an intending purchaser of real estate in Porto Rico permitted by the law to ignore knowledge actually possessed or acquired by him, otherwise than from the registry, before completing his purchase, that the title to, or lien upon, such property in fact exists in favor of a person other than the proposed vendor?

The articles of mortgage (or recording) law, which are material to this inquiry, and which may be referred to in some of the cases hereinafter cited, are as translated in the War Department edition of 1899: Arts. 2, 23, 25, 27, 33–36, 42, 69, 99; and see *Valdes* v. *Valle*, 1 Dec. de P. R.; and see also §§ 612–615, 1258–1265 of the Civil Code of 1902 having more or less correlation with the articles of the mortgage law, especially § 34, with which the present controversy, however, has directly to do especially with reference to the phrase "third persons" as used therein. See 58 Juris. Civil de España, 460; vol. 102, p. 390.

From all these cases we submit it conclusively appears that the answer to the questions propounded at the opening of this discussion must be in the negative, and that any proper and sufficient proof of notice, which would be sufficient to destroy the good faith of an intending purchaser and make it equitable that he be charged with the claim or lien of a person other than his vendor, will under the Spanish law, and the mortgage law, result in his being so charged.

We leave those cases and the conclusion to be drawn from them to the consideration of the court without further discussion.

It may also be shown, although not material, we believe, in this case that in the jurisdictions of those States of the Union which have derived their systems of jurisprudence from the Civil Law, the same rule prevails, as to which, see the following cases: *Sampson* v. *Ohleyer*, 22 California, 200, 211; *Sharp* v. *Lumley*, 34 California, 611, 615; *Wise* v. *Griffith*, 78 California, 152; *Christie* v. *Sherwood*, 113 California, 530; *Hibernia Soc.* v. *Lewis*, 117 California, 577; *Splane* v. *Mitcheltree*, 2 La. Ann. 265; *Bach* v. *Abbott*, 6 La. Ann. 809; *Swan* v. *Moore*, 14 La. Ann. 833; *Brian* v. *Bonvillain*, 52 La. Ann. 1794, 1806.

In Louisiana the rule seems to be different as to the effect of notice of unrecorded mortgages, or of those not reinscribed as required by law; but that is clearly the result of an unusual statutory provision, and does not affect the application of the ordinary rule otherwise. *Ridings* v. *Johnson*, 128 U. S. 212; *Lacassagne* v. *Chapius*, 144 U. S. 119.

There was no appearance or brief filed for appellee.

Mr. Justice White delivered the opinion of the court.

Todd, a judgment creditor of Pedro and Juan Agostini, sued Anna Merle to subject property registered in her name to the payment of the judgment, on the ground that she was a mere interposed person, resulting from simulated conveyances to

her made by the Agostinis. To enforce a decree in his favor Todd advertised the property for sale. Romeu, alleging himself to be an innocent third person, who had bought the property pending the suit, filed a bill to enjoin. A demurrer on behalf of Todd having been sustained, and a final decree entered against Romeu, he brought the cause to this court. The judgment was reversed and the case remanded. *Romeu* v. *Todd*, 206 U. S. 358.

In virtue of leave given him by the court below, Todd answered, and alleged that Romeu was not an innocent third person, because he had bought with notice of the pendency of the suit. A demurrer on the ground that this answer stated no defense was sustained, and a final decree was rendered enjoining Todd from proceeding against the property. This appeal is prosecuted by Todd, and the question for decision is thus stated in the brief filed on his behalf: "What is the law of Porto Rico as to the effect of bringing home to an intending purchaser of real estate knowledge or notice of a defect in the title to, or of a lien upon, such real estate in favor of some person other than the vendor, where such knowledge or notice is not required (acquired?) from the Registry of property, such defect or lien not being recorded?" Under the assumption that the pending suit, by operation of law, dismembered the ownership of Merle in the property to which the suit related, pending the same, or operated, from the fact of its pendency, to create a lien upon the property, decisions of the Supreme Courts, both of Porto Rico and of Spain, are referred to as establishing that one who acquires a right in or to property with knowledge of a defective title or of an existing lien is not a third party, and therefore is not entitled to rights which depend for their existence upon that relation. Conceding, for the sake of the argument, that the decisions relied on announce the principle which is attributed to them, we think they are here inapposite. We say this because their applicability depends upon the erroneous assumption upon which the entire argument necessarily proceeds, that is to say, upon the theory

that by operation of law the effect of the pending suit against Merle was either to create a defect in the title of the property standing in her name, or to engender a lien on the same.

When the case was previously here we held: (*a*) That, differing from the ancient Spanish law, the modern Spanish law did not deprive an owner of property of the right, because a suit was brought against him concerning the same, to dispose of the property *pendente lite*. Pp. 363, 364. But while this was the case, the modern law, in order to prevent this right from depriving suitors of the ultimate benefit to result from the successful prosecution of suits, and to protect the public, provided for a system of cautionary notices, by means of which suitors in the cases provided for could put upon the public record a notice concerning the pendency of their suits, thus protecting those who dealt with property upon the faith of the recorded title, leaving the owner the power to dispose of his property pending a suit, and at the same time saving to those who sued the enjoyment of their ultimate rights if they recorded a cautionary notice. (*b*) As these requirements of the local law were incompatible and in conflict with the doctrine of *lis pendens* prevailing in the courts of the United States, it was held that that doctrine did not obtain in Porto Rico, because the legislation of Congress concerning that island contemplated the fostering and not the overthrow of the local laws, especially those governing the title to real estate. P. 364. (*c*) Applying these rulings, it was decided that as Todd had not availed of the privilege of the local law by applying for and recording a cautionary notice, the court below had erroneously decided that the property in the hands of Romeu, an innocent third person, who had bought from Merle [illegible] the faith of the record title, was liable to Todd as the result of the decree ultimately rendered in his favor.

It thus becomes apparent that the assumption as to dismemberment of ownership and consequent defective title, or a lien on the property arising solely by the pendency of the Todd suit upon which the case before us primarily depends, is

without foundation, and was expressly decided to be so by our previous ruling. The case then, if it has any foundation at all, can only rest upon the hypothesis that, as by the pendency of the suit, the law gave the right to obtain a cautionary notice and put the same upon the public records, so that if the suit ultimated in favor of the complainant the person buying the property or dealing concerning the same pending the suit would do so subject to rights finally established in favor of the complainant, therefore the knowledge of the suit and of the rights arising from it as a result of the privilege of registering a cautionary notice deprived the person having such knowledge of the attitude of an innocent third party, and subjected the property in his hands to a responsibility for the result of the suit to the extent which would have been the case had the notice been recorded. But this also depends upon an erroneous assumption as to the operation and effect of the local law as to cautionary notice. In that law, as expressly held in the previous opinion, the provision as to cautionary notices which was applicable to the suit of *Todd* v. *Merle* was embraced in the mortgage law, and was as follows (article 42, p. 365): "Cautionary notices of their respective interests in the corresponding public registries may be demanded by: 1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right." This provision is followed by nine other paragraphs, specifying particular cases in which a cautionary notice is authorized, none, however, of these paragraphs having any relation to the case in hand. But the right to have a cautionary notice and to record it in order to cause the pendency of the suit to be operative against property involved in the suit, against persons buying, pending the suit, on the faith of the registered title was not an absolute one arising in and by the effect of the pendency of the suit, but was contingent; that is to say, could only arise as the result of an application made to the court to grant the cautionary notice and by a judgment of the court awarding the same. This

clearly follows from a subsequent provision of the mortgage law, saying (art. 43):

"In the case of No. 1 of the preceding article no cautionary notice may be made unless it is so ordered by a judicial decree issued at the instance of a person having a right thereto and by virtue of a document sufficient in the opinion of the judge."

In other words, the right in the case specified to the cautionary notice was not absolute, but relative. That is to say, the law, considering the right of an owner to dispose of his property and the injustice which would arise from limiting such right in every case merely because a suit was brought against him concerning the property, gives the right to the cautionary notice in such case, not merely because of the commencement of the suit, but makes it should depend upon an express order of the court granting the cautionary notice. As, therefore, the right to a cautionary notice did not arise in and by virtue of the pendency of the suit and could only have come from a judicial decree which was never applied for and never rendered, it must follow that the assumption that there was an existing dismemberment of ownership or lien arising from the conception that there was the absolute right to the cautionary notice has no foundation upon which to rest. It results that the contention reduces itself to this, that Romeu, the purchaser, who bought the property on the faith of the recorded title and in the absence of a cautionary notice, was bound because he had knowledge of the suit, although by operation of law the suit had no effect whatever upon the right of the owner to dispose of the property during its pendency, since the steps which the law provided as necessary to limit the right of the owner had not been taken. Thus to bring the proposition relied upon to establish that error was committed by the court below to its ultimate conclusion is to demonstrate its want of merit.

Of course, our ruling is confined to the case before us, and we do not, therefore, intimate an opinion as to whether the

doctrine that notice is equivalent to registry is or not compatible with the public policy manifested by the requirements of the mortgage law prevailing in Porto Rico. And upon the hypothesis that the doctrine that notice is equivalent to registry is not incompatible with the requirements of the mortgage law, we must not be understood as deciding that one who bought where no cautionary notice had been registered, but with knowledge of a pending suit from which, owing to its character, the law gave an absolute right, without the prerequisite of judicial action to the cautionary notice, would not be liable to the extent of the property acquired *pendente lite* for the ultimate results of the suit. See, among others, paragraph 2 of article 42 of the mortgage law in connection with the second paragraph of article 43 of the same law.

Affirmed.